

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

GUY WAZOUA,

Case No. 0099013549

Charging Party,

ORDER

-v-

AMES CONSTRUCTION INC,

Respondent.

Guy Wazoua (Wazoua), filed a complaint with the Human Rights Bureau, Department of Labor and Industry (Department) alleging discrimination by his former employer, Ames Construction (Ames), on the basis of his race and national origin, hostile work environment and retaliation for reporting the discrimination to his employer and the Human Rights Bureau.

Following an informal investigation, the Department determined that a preponderance of the evidence supported Wazoua's allegations of unlawful discrimination and retaliation. The case went before the Hearings Bureau, which found employer liability and awarded damages. Wazoua and Ames each filed cross appeals with the Montana Human Rights Commission (Commission). The Commission considered both appeals on September 22, 2010. Patricia Peterman appeared and argued on behalf of Guy Wazoua. Brian Bolinder appeared and argued on behalf of Amers Construction.

The hearing officer's Final Agency Decision concluded Ames discriminated against Wazoua on the basis of race by allowing a hostile work environment to exist. Racial epithets were commonly used in the workplace by co-workers, which the hearing officer found to be both subjectively and objectively hostile. Wazoua complained to co-

workers and supervisors, but Ames failed to take appropriate corrective action. The racial slurs against Wazoua were broadcast on the company's radio system. The hearing officer rejected Wazoua's claim of retaliation and concluded that Wazoua failed to meet his burden of showing Ames terminated his employment in retaliation for Wazoua's protected activity of reporting discrimination. Although the discharge from employment occurred within weeks of Wazoua's complaint about racial discrimination, the hearing officer concluded Ames discharged Wazoua for the legitimate, non-discriminatory reason of Wazoua's inadequate safety record. The hearing officer ordered affirmative relief, requiring Ames to institute human rights training to prevent future on-the-job racial discrimination, and awarded Wazoua \$30,000 in compensatory damages for humiliation and emotional distress.

On appeal to the Commission, Wazoua argued that the hearing officer incorrectly concluded that Wazoua failed to demonstrate retaliation. Wazoua claimed that sequential disciplinary action, which occurred on the heels of his complaints about racial discrimination, demonstrated that his termination for safety concerns was a pretext for discrimination. Wazoua complained to supervisors on December 8, 2008, and was suspended later that shift. Wazoua again complained about racial harassment to his foreman on January 10th and was terminated from employment on January 12th. Wazoua filed his human rights complaint on January 29, 2010, and he was never recalled to work by Ames, as Ames had promised. Wazoua argued that undisputed evidence showed him to be a high quality, reliable laborer. At the hearing, an Ames supervisor testified that after Wazoua filed a human rights complaint, the company would never rehire him "because he was no longer an asset." Wazoua argued that the hearing officer neglected to address the retaliatory nature of Ames' failure to rehire Wazoua.

Ames argued that there was no factual basis for liability because the perpetrators of racial discrimination against Wazoua in the workplace had no supervisory authority and actual supervisors claimed ignorance of all racial discrimination. Workers broadcast racial slurs over the company radio, which caused the hearing officer to infer supervisors listened and knew of the racial discrimination. Ames argued this inference was a mistake and disputed all evidence that Wazoua informed supervisors of race-related comments on three different occasions. Essentially, Ames argued that the hearing officer abused his discretion by finding testimony of Wazoua and another witness to be "highly" credible. Ames further argued that, because the discrimination against Wazoua was only verbal and occasional, the evidence did not support the hearing officer's finding that the harassment was humiliating and emotionally distressing. And, finally, Ames claimed the affirmative relief ordered by the hearing officer was redundant and onerous because Ames already has a non-discrimination policy in place.

After careful consideration, the Commission determines that the hearing officer's findings of fact are based upon competent substantial evidence. The hearing officer's conclusion that Wazoua was disciplined and ultimately discharged from employment for a legitimate business reason (safety) is supported by the record and, therefore, not retaliatory. Ames' failure to rehire Wazoua is an cause of action that post-dates the filing of Wazoua's human rights complaint on January 29, 2010.

The Commission further determines that the vicarious liability argument put forth by Ames is not supported by the record. The hearing officer, as the finder of fact, used his discretion in finding the testimony of Wazoua and another witness to be "highly" credible regarding Wazoua's reports of discrimination to his employer. The Commission determines that the hearing officer's findings on the "severe and pervasive" nature of

the discrimination against Wazoua also are supported by competent substantial evidence. Wherever discrimination in the workplace is found in Montana, the Commission is compelled to take action to prevent further discrimination by ordering affirmative relief.

Therefore, the Commission affirms the hearing officer's findings and conclusions.

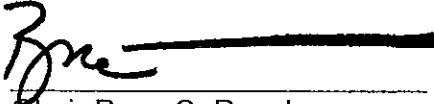
Either party may petition the district court for judicial review of the Final Agency Decision. *Sections 2-4-702 and 49-2-505, MCA.* This review must be requested within 30 days of the date of this order.

IT IS HEREBY ORDERED, that the appeal of Guy Wazoua is **denied**.

IT IS FURTHER ORDERED, that the appeal of Ames Construction is **denied**.

The Commission affirms the Final Agency Decision.

DATED this 20th day of October 2010.


Chair Ryan C. Rusche
Human Rights Commission


CERTIFICATE OF SERVICE

The undersigned secretary for the Human Rights Commission certifies that a true and correct copy of the foregoing ORDER was mailed to the following by U.S. Mail, postage prepaid, on this 25th day of October 2010.

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